Ref. No. 369

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant, v. CHARO'S CORPORATION d.b.a., "CHARO'S RESTAURANT", Respondent.	8 U.S.C. 1324a Proceeding CASE NO. 90100149

DECISION AND ORDER

E. MILTON FROSBURG, Administrative Law Judge

Appearances:

Dayna M. Dias, Esquire
Elizabeth A. Hacker, Esquire
Immigration and Naturalization Service
for Complainant;
Gerhard Frohlich, Esquire (appearance withdrawn)
Peter Anthony Schey, Esquire
Carlos Holguin, Esquire
for Respondent.

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I. INTRODUCTION

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted Section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. § 1324a, Congress provided for civil penalties for employers who failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b).

Title 8 U.S.C. § 1324a(b)(1)(A) provides that an employer is liable for failure to attest "on a form designated or established by regulation of the Attorney General that it has verified that the individual is not an unauthorized alien ...." The form used for verification is the Employment Eligibility Verification Form, commonly known as the I-9. The regulations provide that the employee will also attest, under penalty of perjury, as to his or her identity and employment authorization.

Title 8 U.S.C. § 1324a(b)(3) dictates the retention requirements of Forms I-9 by employers, and the inspection procedures to be utilized in the enforcement of this program. Agents of the Immigration and Naturalization Service (INS) are authorized to conduct inspections of employers' I-9 files to ascertain the employers' compliance with IRCA. If violations are found during these inspections, penalties may be assessed in accordance with 8 U.S.C. § 1324a(e). The employer, upon the receipt of an assessment notification, may opt to comply with the assessment, or may elect a hearing before an Administrative Law Judge, thus abating the penalty during the hearing procedure.

II. PROCEDURAL HISTORY

On March 23, 1990, the United States of America, INS, served a Notice of Intent to Fine (NIF) on Charo's Corporation, d.b.a. "Charo's Restaurant". The NIF, at Count I, alleged 3 violations of Section 274A(a)(1)(A) of the Act for the knowing hiring of aliens unauthorized for employment in the United States. Count II alleged four violations of Section 274A(a)(1)(B) for failure to prepare and/or present for inspection the employment eligibility verification form (Form I-9). Count III alleged 58 violations of Section 274A(a)(1)(B) for failure to prepare and/or present the Form I-9. Count IV alleged two violations of Section 274A(a)(1)(B) for failure to properly complete Section 2 of the Form I-9. In a letter dated

March 27, 1990, Respondent, through its counsel, Gerhard Frohlich, requested a hearing before an Administrative Law Judge.

The United States of America filed a Complaint incorporating the allegations in the NIF against Respondent on April 26, 1990. On April 27, 1990, the Office of the Chief Administrative Hearing Officer (OCAHO) issued a Notice of Hearing on Complaint Regarding Unlawful Employment, assigning me as the Administrative Law Judge in the case and setting the hearing place at Honolulu, Hawaii.

Respondent answered the Complaint on May 25, 1990, specifically denying each substantive allegation. I issued an Order Directing Procedures for Pre-Hearing on May 31, 1990, instructing the parties as to the procedural guidelines applicable to this proceeding. The parties thereafter engaged in discovery and settlement negotiations, but were unable to arrive at a satisfactory settlement agreement.

On November 7, 1990, Complainant moved for an Order regarding 28 C.F.R. Part 68.8.(c), requesting that Respondent be barred from averring any affirmative defenses on timeliness grounds. This motion was discussed during a pre-hearing telephonic conference on November 26, 1990. At that time I ordered Respondent to file any affirmative defenses by December 31, 1990. I set a hearing date for March 12-14, 1991, at Honolulu, Hawaii. I also established January 30, 1991, as the cut-off date for discovery.

On January 25, 1991, Complainant moved for an extension of time in which to complete discovery and for leave to propound more than 20 interrogatories. Respondent joined in the request to extend discovery on January 28, 1991. On February 1, 1991, I conducted a second telephonic conference in which I entertained an oral motion to continue the hearing date. The hearing was re-scheduled to April 9, 1991. I also ordered that discovery be completed by March 15, 1991. I granted Complainant's motion to serve an additional 20 interrogatories.

On February 26, 1991, I received Complainant's Motion for Summary Decision along with points and authorities in support thereof. Complainant requested summary decision for many of the violations listed in Counts II, III, and IV of Complaint and stated that no genuine issues of fact ex with respect to the named violations. Therefore, s decision was appropriate in Complainant's favor as a mat law.

On February 28, 1991, the parties joined me in a telephonic conference. At that time I granted Complai motion to waive the 20-day notice requirement for the taki

depositions, upon Respondent's consent. I also granted Complainant an additional five interrogatories.

Respondent's Response to Complainant's Motion for Summary Decision, dated March 12, 1991, conceded that no questions of fact existed with respect to the liability issues regarding the violations named in the Motion. Respondent did not agree as to the amounts of the civil penalties assessed by Complainant and stated that this was a material fact in dispute.

On March 13, 1991, Complainant submitted a Motion to Amend Complaint, requesting to add an additional violation to Count III based upon Respondent's alleged failure to prepare and/or present for inspection the Form I-9. (This Motion was inadvertently overlooked or misfiled at that time and was not ruled upon until the Motion was re-submitted by Complainant immediately prior to the hearing on the merits.)

On March 19, 1991, I issued an Order Granting in Part Complainant's Motion for Summary Decision. I found no genuine questions of fact remaining with respect to the liability issues of many of the violations named in Counts II - IV. I based my finding substantially upon Respondent's response to the Motion for Summary Decision and Respondent's admissions as to these particular violations. I found that Respondent violated Section 274A(a)(1)(B) of the Act, as alleged in Count II of the Complaint, by failing to prepare Forms I-9 for three of the individuals named therein. I found that Respondent violated Section 274A(a)(1)(B) of the Act, as alleged in Count III of the Complaint, by failing to prepare Forms I-9 for 49 of the individuals named therein. I found that Respondent violated Section 274A(a)(1)(B) of the Act, as alleged in Count IV of the Complaint, by failing to properly complete Section 2 of the Form I-9 for the two individuals named therein. I agreed with Respondent that the amount of the civil penalty was a question of material fact and I did not grant summary decision as to penalty, but only as to liability.

On March 21, 1991, Complainant moved for an extension of time in which to depose a prospective witness due to its inability to locate and serve this witness with a subpoena. I addressed this issue in a telephonic conference with the parties on the same date. I granted Complainant's request to extend the cut-off date for the taking of a deposition for this particular witness.

In a Motion dated March 12, 1991, Respondent requested a Protective Order, requesting that Complainant disclose the persons and documents identified in subpoenas issued upon Complainant's request. Respondent also requested that it be provided with any further requests for subpoenas and with any documents obtained through the use of subpoenas. Complainant objected to this Motion in its pleading of March 21, 1991. I

discussed this issue with the parties in a telephonic conference on April 1, 1991. I indicated that Respondent was entitled to the names of all potential witnesses subpoenaed at Complainant's request for this hearing. Complainant also conceded that its District Director had issued subpoenas for documents after I had been assigned to the case. I stated my belief that once I was assigned as the Administrative Law Judge, all requests for subpoenas were required to go through my office. I requested Complainant to provide Respondent and me with copies of all subpoenas issued by the INS after I was assigned to hear this matter. I also indicated to Complainant that I would not issue any subpoenas for persons not completely identified by surname in Complainant's request.

I received Complainant's Witness and Exhibit List on April 3, 1991. On the same date I conducted another telephonic conference with the parties, during which we discussed additional pre-hearing matters.

On April 5, 1991, I received Complainant's Supplemental Motion for Summary Decision with points and authorities in support thereof. Complainant requested summary decision with respect to the remaining violations listed in Count III which were not disposed of by my Order of March 19, 1991.

Complainant filed its Supplemental Witness and Exhibit List on April 8, 1991. On the same date, Respondent filed its List of Prospective Witnesses and Prospective Exhibits. I also received both parties' pre-hearing briefs. Additionally, Respondent filed a Motion for Protective Order, seeking the exclusion of certain evidence from the hearing due to its belief that such evidence was improperly obtained by Complainant and was prejudicial because its existence was not timely disclosed. Complainant provided its Motion for Admission of Evidence Obtained by Means of Administrative Subpoena, requesting that it not be precluded from presenting evidence which Respondent sought to be suppressed.

I met with the parties in a pre-hearing conference in Honolulu, Hawaii on April 8, 1991, in which we discussed additional pre-hearing matters. I stated my intention to grant Complainant's Motion to Amend the Complaint by adding Bruce Lesher to the list of individuals named at Count III of the Complaint. We also discussed stipulated facts which the parties agreed upon prior to the outset of the hearing. I addressed Respondent's request to suppress evidence obtained through the use of "investigative subpoenas" issued by the District Director of the INS. Although I agreed with Respondent that fairness would seem to dictate that all subpoenas should be requested through and issued by the Administrative Law Judge once appointed to the case, the INS appeared to have concurrent powers to issue investigatory subpoenas even after the appointment of an ALJ. The ambiguity

in the regulations applicable to the issuance of subpoenas had to be interpreted in favor of the INS in this instance. However, I indicated a dissatisfaction with the current understanding by the INS of its subpoena authority, and suggested that the issue required further clarification and discussion between OCAHO and the INS.

The hearing on the merits was to commence on April 9, 1991, however, a power failure prevented the hearing from taking place until April 10, 1991. Complainant presented nine witnesses and offered 18 exhibits into evidence, of which I admitted 16 (C-4 and C-10 were not admitted). Respondent presented two witnesses and 24 exhibits, of which I admitted 24. A hearing record of 619 pages was compiled, exclusive of exhibits.

At the outset of the hearing I granted Complainant's Motion to Amend the Complaint by adding the additional violation involving Bruce Lesher to Count III. During a meeting in chambers with the parties, Respondent agreed to admit to liability for this newly added violation and Complainant agreed to recommend the minimum civil penalty of $100.00 for the violation.

Respondent also indicated that its responses to discovery did admit to the remaining violations in Count III (which had not been resolved by my March 19, 1991 Order). However, it did object to the timeliness of Complainant's filing of the Supplemental Motion for Summary Decision.

In chambers, Complainant moved to strike the violation in Count III involving Luis Hernandez. Although I had previously ruled as to liability regarding this particular violation, based upon admissions by Respondent, Complainant explained that a Form I-9 had indeed been prepared and presented for this individual, but that Luis Hernandez had placed his middle name on the form rather than his given name. This led Complainant to believe that the form was completed for a different individual. I agreed that this violation should be stricken from the Complaint and indicated that I would amend my Order of March 19, 1991 to reflect this decision.

Prior to the close of the hearing Complainant moved to dismiss Count I in its entirety, based upon the testimony of its witness, Maria Gabriela Rodriguez and an apparent problem in obtaining the testimony of other individuals who could offer proof as to liability for Count I. I ordered Count I dismissed.

Subsequent to the hearing, on April 25, 1991, I issued an Order Re: Post Hearing Briefs and Memoranda, indicating that the parties would be given a 30 day period following receipt of the hearing transcript in which to submit briefs. On May 15, 1991, I received Respondent's Motion for Attorneys' Fees and Costs and a memorandum in support thereof. After learning that

the parties had received their copies of the hearing transcript, I issued an Order on May 23, 1991, setting the deadline for submission of briefs at June 21, 1991. In said Order I also confirmed a telephonic discussion with the parties on May 22, 1991, in which Respondent indicated a desire to submit additional information regarding certain of the violations in Count III which had previously been disposed of through summary decision. I agreed to permit Respondent the opportunity to re-open this issue and instructed both parties that any further submissions would be due by the June 21, 1991 deadline.

On May 25, 1991, Respondent submitted a Notice of Appearance for Peter Anthony Schey, Esquire and Carlos Holguin, Esquire, as representatives on its behalf. Complainant submitted a Motion for Notice of Appearance and/or Substitution of Counsel on May 29, 1991, because it had not yet received a Notice of Appearance for Attorneys Schey and Holguin. I issued an Order on May 31, 1991, indicating that Complainant's Motion was moot due to the recent submission of the Notice of Appearance by Respondent's newly retained counsel.

On June 19, 1991, I received Complainant's Post-Hearing Memorandum, followed on June 20, 1991, by its Memorandum of Points and Authorities in Opposition to Motion for Attorneys' Fees and Costs. Respondent telephonically contacted my office on June 20, 1991, requesting a three day extension of time in which to submit its post-hearing brief, due to counsel's illness. I granted Respondent's request over Complainant's objection. On June 24, 1991, I received Respondent's Brief Re Admissions and Mitigation and its Supplemental Memorandum of Law in Support of Respondent's Motion for Attorneys' Fees and Costs.

On June 26, 1991, Respondent filed Attorney Frohlich's withdrawal from the case as counsel and Attorney Schey's appearance. Complainant moved to file a reply brief on June 27, 1991, which was granted on July 15, 1991. On July 11, 1991, Complainant submitted a Motion to Strike Certain Exhibits and Certain Attorneys' Fees and Costs, along with a supporting memorandum.

On July 24, 1991, Complainant requested additional time in which to file its reply brief. This Motion was granted in my Order of July 25, 1991, setting the due date for submission of the brief at August 5, 1991. I received Complainant's Reply Brief Regarding Count III on August 5, 1991. I issued an Order on August 6, 1991, informing the parties that the record was closed and that my final decision would be forthcoming.

Prior to receiving my August 6, 1991 Order, Complainant had mailed its Motion to Strike Affidavits #9, #10, #11, and

#30 From Respondent's List of Post-Hearing Exhibits. I accepted this document due to the timing of its filing by Complainant. I subsequently received Respondent's Motion for Extension of Time Within Which to File Opposition to Complainant's Motion to Strike, along with Respondent's Opposition to Motion to Strike, both dated August 17, 1991. In order to be fair to all parties and to have a complete record, I also accepted and considered Respondent's late-filed submissions.

III. LEGAL ANALYSIS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Count I:

Based upon Complainant's motion to dismiss Count I and the allegations contained therein, and the lack of opposition to this motion, I ordered Count I dismissed during the proceeding. Count I is dismissed with prejudice in its entirety.

Count II:

My Order of March 19, 1991, disposed of three of the four violations in Count II. I granted summary decision in favor of Complainant on these three violations.

The remaining violation, regarding Maria Gabriela Rodriguez, was not previously ruled upon. Complainant's original motion for summary decision did not present sufficient evidence to support this violation. My understanding during the proceeding and conferences with the parties was that Respondent's general admissions extended only to Count III, not Count II.

In reviewing the evidence presented throughout the hearing, I find that Complainant failed to meet its burden of proof in establishing that Ms. Rodriguez was in fact employed by Respondent after November 6, 1986. In order for me to find a violation of Section 274A(a)(1)(B), I must determine that the individual in question was in fact employed by the respondent. Complainant's lack of credible evidence supporting this crucial element of the alleged violation causes me to find in favor of Respondent on this particular allegation.

Quite a bit of confusion has been generated regarding this allegation in Count II, partly because Complainant's supplemental motion for summary decision was submitted on the eve of trial and the parties did not, therefore, have the benefit of my decision regarding this motion. In fact, Respondent's post-hearing briefs and memoranda assume

incorrectly that a finding was made for Complainant on this allegation.

The discovery responses provided by Respondent with respect to the employment of Ms. Rodriguez generally stated that she was not employed by Respondent to work in the restaurant, nor was she compensated for the few chores she admittedly performed there. Complainant's conflicting evidence at hearing was not sufficient to cause me to find that Ms. Rodriguez was "employed" by Respondent within the definition of 8 C.F.R. Part 274a.1(f).

Having found three violations of Section 274A(a)(1)(B), I must assess a civil penalty. My analysis regarding an appropriate civil penalty will be presented below.

Count III:

As stated above, I previously ruled in favor of Complainant with respect to 49 of the violations alleged in Count III. During the course of the proceeding, I agreed to amend my ruling as it pertains to Luis Hernandez. I hereby strike that portion of my March 19, 1991 Order regarding Luis Hernandez. Based upon Complainant's motion, I find that Respondent did present a Form I-9 at the inspection for this individual, therefore, the alleged violation did not occur.

I also ordered that the Complaint be amended to include an additional violation in Count III, that pertaining to Bruce Lesher. Based upon Respondent's admissions at the hearing regarding this allegation, I find that Respondent has violated Section 274A(a)(1)(B) of the Act by failing to prepare a Form I-9 for this individual.

During the hearing I additionally accepted Respondent's verbal admissions as to its liability for the remaining nine violations in Count III, and granted summary decision in favor of Complainant as to each of them. These admissions are also reflected in Respondent's responses to discovery.

I have been asked to reconsider my ruling regarding certain violations previously admitted to by Respondent. Respondent contends that it delivered Forms I-9 for the following employees to the INS shortly after the inspection and that these forms were in fact timely prepared by Respondent: Crystal Henderson, James Henderson, and Jose Rodriguez.

Respondent additionally argues that it should not be liable for violations regarding Forms I-9 which were discovered by Respondent subsequent to its admissions of liability. Respondent states that its officers recently located these documents in an "unmarked box under unused supplies in the

restaurant". Declaration of Kjell Rasten. Respondent attributes the misplacing of these forms to its former management staff, which left its business affairs in disarray. The Forms I-9 which were allegedly prepared and misplaced relate to the following employees named in Count III: Marta Birchard, Amanda Burden, Brav Ellis, Carol Engling, Carly Goodrich, Wendy Gooding, Linda Kanahele, Katherine May, David Nelson, Susan Pico and Dennis Williams.

Respondent seeks to withdraw its broad admission as to liability for Count III due to the above arguments. Respondent further contends that it concentrated and prepared most strenuously for its defense to Count I and made the admissions to Count III to more easily facilitate the proceeding for all concerned.

Complainant opposes Respondent's request for reconsideration of these 14 violations in Count III. Complainant argues that these newly raised defenses are untimely and are not sufficiently supported by accurate evidence. Regarding the statement that three of the Forms I-9 were delivered to the INS shortly after the inspection, Complainant states that no such forms were delivered and that the notes prepared by the INS case agent assigned to conduct the inspection of Respondent's business support Complainant's view.

The evidence presented by Complainant specifically shows that I-9's were not presented for Crystal Henderson and James Henderson, whose names appeared on a list of employees which was supplied by Respondent. The INS case agent requested additional clarifying information relative to Jose Rodriguez' employment after seeing his name on an employee list, but finding no Form I-9 for him.

I agree with Complainant that this newly presented evidence does not amount to an acceptable defense to these violations. I am not satisfied by the evidence provided that Respondent did present the three Forms I-9 in question shortly after the inspection of September 27, 1989. The affidavits and declarations presented by Respondent show that the declarants "believe" these forms were provided during 1989 to the INS. I find no declaration from Donna Rocchio, an employee in Attorney Frohlich's law firm, who supposedly presented these forms to the INS.

I believe I provided Respondent every opportunity to prove that these Forms I-9 were presented to the INS, despite this defense being raised in an untimely manner. Respondent has not demonstrated to my satisfaction that its defense is warranted. On the other hand, Complainant has proven by a preponderance of the evidence that these three employees were

employed by Respondent after November 6, 1986, in the United States, and that no Forms I-9 were presented during, or even after, the scheduled inspection for them. Complainant's presentation also reveals that the INS provided more than sufficient opportunity for Respondent to present the documents requested to complete the inspection. My previous ruling regarding Crystal Henderson, James Henderson, and Jose Rodriguez remains intact.

Complainant's pleading did not specifically address Respondent's request regarding the 11 other Count III violations for which Respondent seeks my reconsideration. However, I have examined Respondent's argument and supporting documents. In reviewing these documents, specifically the Forms I-9 for the individuals in question, I have determined that several of them were not even prepared as of the date of the inspection of September 27, 1989. My findings for each of them are listed below:

(a) Marta Birchard: This I-9 is dated December 20, 1989, which is subsequent to the inspection.

(b) Amanda Burden: This I-9 is dated June 5, 1991, which is more than 18 months after the inspection.

(c) Brav Ellis: This I-9 is dated December 3, 1989, which is subsequent to the inspection.

(d) Carol Engling: This I-9 is dated October 10, 1989, which is subsequent to the inspection.

(e) Wendy Gooding: This I-9 is dated December 12, 1989 in section 1, which is subsequent to the inspection. It is also incomplete in section 2.

(f) Carly Goodrich: This I-9 is dated April 8, 1991, more than 18 months after the scheduled inspection.

(g) Linda Kanahele: This I-9 is dated January 9, 1990 in section 1, and November 1, 1989 in section 2. Both dates post-date the inspection.

(h) Katherine May: This I-9 is dated April 12, 1989, which is prior to the inspection.

(i) David Nelson: This I-9 is dated December 12, 1989, which is subsequent to the inspection. The verification block in section 2 is also incomplete.

(j) Susan Pico: This I-9 is dated September 13, 1989 in section 1, which is prior to the inspection. However, the verification block in section 2 is blank.

(k) Dennis Williams: This I-9 is dated April 4, 1990, which is more than 18 months after the scheduled inspection.

My review of these forms reveals that only two of them pre-date the inspection, those for Katherine May and Susan Pico. Pico's form is incomplete in section 2. Even if this form had been presented to the INS in a timely manner, it would have been subject to civil penalties in violation of Section 274A(a)(1)(B) of the Act. The remaining nine forms could not have been presented to the INS on September 27, 1989, because they were not even prepared by that date.

I find little if any merit in Respondent's newly presented defense that these forms were misplaced at the time of the inspection. Respondent appears to be arguing that all of them were in one location and were discovered together in an unmarked box containing papers from 1989 and 1990. The most recent of these forms, that of Amanda Burden, is dated June 5, 1991. This was obviously prepared after the hearing in this matter had concluded.

I find that Complainant has sufficiently proven, by a preponderance of the evidence, that the 11 employees in question were employed by Respondent after November 6, 1986, in the United States, and that Respondent failed to prepare Forms I-9 for Marta Birchard, Amanda Burden, Brav Ellis, Carol Engling, Carly Goodrich, Wendy Gooding, Linda Kanahele, David Nelson, and Dennis Williams, as of the date of the INS inspection. My March 19, 1991, ruling regarding summary decision will stand as to each of them, with the exception of Linda Kanahele, who was not covered by that Order. My ruling regarding summary decision, which was rendered during a conference with the parties on April 8, 1991, remains undisturbed with respect to Ms. Kanahele.

My March 19, 1991 Order is hereby amended with respect to the following employees: Katherine May and Susan Pico. I find that Respondent employed each of them after November 6, 1986, in the United States, and that Respondent <u>failed to present for inspection</u> Forms I-9 for these two employees.

In sum, I find that Respondent has violated Section 274A(a)(1)(B) with respect to 58 of the employees named in Count III. I must assess civil penalties with respect to these violations.

<u>Count IV</u>:

I previously ruled on liability for both allegations in Count IV, but reserved my ruling regarding civil penalties for these violations. My decision regarding civil penalties for Count IV follows.

Civil Monetary Penalties:

It is my judgment that Respondent has violated Section 274A(a)(1)(B) of the Act. I must, therefore, assess a civil money penalty pursuant to section 274A(e)(5) of the Act. The statute states, in pertinent part, that:

> with respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less that $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

8 U.S.C. § 1324a(e)(5).

I will discuss each of the five pertinent criteria below and address my findings as to each of them:

Size of Business:

It is my view that Respondent owns a small to medium sized business, which has operated at a loss since its inception. I will mitigate the civil penalty in Respondent's behalf on this criteria.

Good Faith:

It is difficult for me to mitigate the penalty based on Respondent's claimed good faith due to the large number of violations found. I find that Respondent cooperated with Complainant throughout this proceeding and that it is attempting to come into full compliance with IRCA, if it has not done so already. Respondent's evidence also shows that its owners and officers stressed the importance of I-9 documentation to its managers subsequent to the educational visit it received in April 1989. However, Respondent has admitted to more than 60 paperwork violations in this proceeding. Obviously, its owners did not sufficiently ensure that IRCA's requirements were being met. I will, therefore, consider this a neutral factor in arriving at an appropriate penalty amount.

Seriousness of the Violation:

IRCA violations are all considered to be serious, however, it is my view that violations based upon a failure to

prepare Forms I-9 are more serious than those for failure to present or to properly complete the forms. I agree with Complainant that a failure to prepare the I-9 provides more opportunity for unauthorized workers to be employed in the United States, thus defeating the purpose of the Act. I will mitigate the penalty for those violations in Counts III and IV which represent a failure to present or a failure to properly complete the Forms I-9, but not for the failure to prepare violations, which represent the majority of charges in this case.

Evidence of Unauthorized Aliens:

Evidence was presented at the hearing to demonstrate that the employees in Count II were not authorized to work in the United States. However, no finding was made that Respondent knew of their unauthorized status. In fact, evidence was also presented to show that Respondent did request to view the employment authorization presented by the employees in Count II, although it did not use this documentation to complete the Forms I-9.

There is no evidence that any of the other employees named in the Complaint were unauthorized aliens. Therefore, I will mitigate the penalty for all of the violations in Counts III and IV, and will partially mitigate the penalty for the three Count II violations.

History of Previous Violations:

I find that Respondent has no history of previous IRCA violations, therefore, I will mitigate the penalty in favor of Respondent on this criteria.

Assessment of Civil Penalty:

Having considered each of the required criteria and the submissions by the parties, it is my view that the civil penalty assessed by Complainant should be reduced. It is my view that Respondent should be ordered to pay the amount of $225.00 for each of the three violations in Count II, $200.00 for the 55 violations in Count III which reflected a failure to prepare the Form I-9, $175.00 for the two violations in Count III which resulted from Respondent's failure to present the Form I-9, $100.00 for the violation in Count III involving Bruce Lesher, and $175.00 for the two violations in Count IV.

Due to the protracted nature of this proceeding, and my observations at the hearing, it is my view that Respondent understands and appreciates its obligations under IRCA and is striving to comply with its requirements. It is not the purpose of IRCA to put employers out of business, but rather,

to encourage compliance with the Act. I believe that the penalty imposed by this Order is fair and appropriate, taking into consideration all aspects of this case.

IV. ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I have carefully considering the record in this case, all documents presented by the parties, and all arguments advanced by the parties. Accordingly, and in addition to the findings of fact and conclusions of law previously made, I make the following ultimate findings of fact and conclusions of law.

1. As previously discussed, I find that Respondent has violated 8 U.S.C. § 1324a(a)(1)(B), by hiring for employment in the United States, after November 6, 1986, the following employees without preparing the Form I-9:

Ruben Hernandez-Elorriaga
Ricardo Hernandez-Elorriaga
Mariano Juarez-Santacruz
James Abercrombie
Marta Birchard
Barbara Brown
Christina Buckley
Amanda Burden
Karin Carswell
Israel Chavez
John Conlogue
Tony Covarrubias
Catherine Curtis
Tiki Degenaro
Ernest Egan
Brav Ellis
Carol Engling
Francisco Espinaco
Joseph Gelardi
Isabel Gonzales
Carly Goodrich
Wendy Gooding
Theresa Guertin
Crystal Henderson
James Henderson
Ignacio Hernandez
Victor Hernandez
Robert Homan
Verna Huddy
Daniel Jensen
Linda Kanahele
Kaethe Kinimaka
William Lanzi

Grant Legault
Bruce Lesher
Tim Liberto
Wendy Lindman
Keoni Kai Lucas
Maureen McHenry
Phillippe Mettout
Astrid Mostogl
David Nelson
Daniel Neuner
Crystal Rain Netto
Alan Phelps
Robert Raming
Jean Rhyne
Jose Rodriguez
Teresa Schwaar
Susan Shepard
Mark Stembler
Jeff Stuart
Tim Terrazas
John Vallier
Dennis Williams
Susan Williams
Paul Wilson
Denise Winn
Dolores Zuniga

2. As previously discussed, I find that Respondent has violated 8 U.S.C. § 1324a(a)(1)(B), by hiring for employment in the United States, after November 6, 1986, the following employees without complying with the retention and inspection requirements of 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. Part 274a.2(b)(2)(i):

Katherine May
Susan Pico

3. As previously discussed, I find that Respondent has violated 8 U.S.C. § 1324a(a)(1)(B), by hiring for employment in the United States, after November 6, 1986, the following employees without complying with the verification requirements of 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. Part 274a.2(b)(1)(ii)(B):

Jana Lea Heidingsfelder
Sherman Kealoha Maka

4. That it is just and reasonable to require Respondent to pay a total civil penalty in the amount of $12,475.00 (twelve thousand four hundred seventy-five) for these violations.

5. This Decision and Order is the final action of the Administrative Law Judge in accordance with 28 C.F.R. Part

68.51(a). As provided by that section, this action shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Decision and Order, the Chief Administrative Hearing Officer, upon request for review, shall have modified or vacated it.

6. Respondent's request for attorneys fees and costs is bifurcated from the liability and penalty issues and is still pending. Due to the voluminous amount of material submitted on this matter, I will require additional time in which to consider the motion and Complainant's opposition. My ruling regarding attorneys fees and costs will be forthcoming, but will not disturb the findings made in this Decision and Order.

IT IS SO ORDERED this 29th day of August, 1991, at San Diego, California.

E. Milton Frosburg

E. MILTON FROSBURG
Administrative Law Judge

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